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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

JAMES CALABRESE, suing individually and
derivatively as, A Member of PARKVIEW AT
SALISBURY, LLC,

Plaintiff,

-against-

TRIAL/JAS, PART 1
NASSAU COUNTY

INDEX No. 602920/15

MOTION DATE: 11/14/16
Motion Sequence 005

AJG PARKVIEW CORP.

Defendant.

AJG PARKVIEW CORP., individually and as
member of PARKVIEW AT SALISBURY LLC,

Plaintiff,

-against-

INDEX No. 603044/15

MOTION DATE: 11/14/1
Motion Sequence 007

PARKVIEW AT SALISBURY, LLC, CALABRESE
BROS, DEVELOPMENT CORP. and JAMES CALABRESE

The following papers read on this motion:

Notice of Motion.....XX
Affirmation in Support.....XX
Affirmation in Opposition.....XX

Motion by plaintiff James Calabrese for leave to reargue the parties' motions for summary judgment is **granted**. Motion by defendants Parkview at Salisbury, LLC, Calabrese Bros. Development Corp., and James Calabrese for leave to reargue the parties' motions for summary judgment is **granted**. Upon reargument, plaintiff Calabrese and defendants Parkview at Salisbury, LLC, Calabrese Bros. Development Corp., and James Calabrese's motions for summary judgment are **granted** to the extent indicated below.

This action arises from a dispute between the members of a limited liability company. Plaintiff in action # 1 James Calabrese owned a parcel of real property in Westbury on which he planned to develop a 30 unit condominium project through his limited liability company, Parkview At Salisbury LLC. Because Calabrese was in need of financing, he admitted defendant AJG Parkview Corp. as a 50% member of Parkview At Salisbury in exchange for AJG's agreement to make an initial capital contribution to Parkview At Salisbury of \$1,500,000.

Pursuant to the operating agreement dated July 18, 2013, AJG Parkview was to make an initial capital contribution of \$1.5 million to Parkview at Salisbury, which was to be used to repay the existing mortgages on the property, totaling \$1,267,388, closing costs of the operating agreement, and construction costs (Dkt 108). Pursuant to Sec 4.7, AJG Parkview was to have "exclusive control" over the company's bank accounts. Calabrese was to be the managing member of Parkview At Salisbury, and Calabrese's construction company, Calabrese Bros. Development Corp., was to perform the construction management work.

The project was to be completed in three phases: first building (8 units); second building (14 units); and third building (8 units). Pursuant to Sec. 7.1[c] of the operating agreement, the first \$1.5 million of "Extraordinary Cash Flow" was to be held as "reserves" to pay costs of construction of phase 2. Under Sec 7.1.(b), "Extraordinary Cash Flow" was defined as cash proceeds of a "Capital Transaction", increased by interest payments on such proceeds, and decreased by expenses of the capital transaction, debt payments, indemnity payments, and reserves established pursuant to Sec. 7.1[c]. "Capital Transaction" was defined in Sec. 1.1 as refinancing or sale of any units in the project.

Schedule 3.7, "Parkview at Salisbury Business Plan," provides that "The goal is to have AJG Parkview and Marie Holdings paid in full, including all principal, interest and fees, upon the sale of the 22 units that make up phase 1 and phase 2. The cost to build phase 3 (8 units) will be paid for by James Calabrese and AJG Parkview will have no responsibility or obligation on Phase 3." According to AJG Parkview, the proceeds of the

sale of phase 2, and any excess over the \$1.5 held in reserve from the proceeds of phase 1, were to be used for "returns" to AJG Parkview and then to fund construction of phase 3.

The operating agreement defines "first preferred return" as "a return to Capital Member [i.e. AJG Parkview] in an amount equal to 83.333% of such Capital Contribution" (Dkt 108 at 5). Additionally, the operating agreement defines "second preferred return" as "a return to the Capital Member [i.e. AJG Parkview] equal to 12% per annum, compounded monthly, on such capital contribution, which shall start to accrue commencing on the first anniversary date of such capital contribution" (Id at 9). However, section 5.9 of the operating agreement provides that "No interest shall be paid on any capital contribution to the company by any member."

Pursuant to Sec. 7.2 of the operating agreement, entitled "Distribution of operating cash flow and extraordinary cash flow," interest and principal on loans were to be paid first, then creditors, then loans from members, and then the first and second preferred returns referred to above. Sec. 7.2 provides that, with respect to distribution of cash flow, Calabrese was to be last in order of priority. Sec. 11.13 provides that in litigation between the members, the prevailing member shall be entitled to reasonable attorney fees.

It appears that AJG Parkview made the \$1.5 million capital contribution by AJG's principal, Anthony Galeotafiore, guaranteeing a loan from Marie Holdings to Parkview at Salisbury in that amount. In any event, on April 23, 2014, the lender, Marie Holdings, Inc., served Parkview at Salisbury with notice of default. It appears that the defaults included commencing work on phase 2 before phase 1 was completed. On April 25, 2014, AJG Parkview served Calabrese with notice of default under the operating agreement. AJG claimed that Calabrese was in default for prematurely commencing work on phase 2 and also failing to pay subcontractors. It appears that the fundamental dispute between the parties is that Calabrese began construction of phase 2 before phase 1 was complete. AJG Parkview further alleges that around September 2014 Calabrese began entering into contracts for phase 3, although phase 2 was not yet complete. In the April 25 letter, AJG purported to terminate the construction management agreement.

On May 21, 2014, AJG Parkview Corp. entered into an agreement with James Calabrese and Calabrese Bros. Construction Company (Dkt 125). The agreement provides that AJG Parkview was to contribute \$650,000 to Parkview at Salisbury to complete the construction work, pay amounts currently due Calabrese Bros. Construction, and other costs. Between May 2014 and April 2015, AJG Parkview made an additional

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capital contribution of \$1,152,000, for a total \$2,652,000 investment. On February 3 and March 19, 2015, AJG Parkview received payments totaling \$748,600, allegedly towards its “first preferred return.”

On May 11, 2015, Calabrese commenced an action against AJG Parkview (Index No 602920/15). Calabrese alleged that AJG Parkview interfered with the day-to-day operations of Parkview at Salisbury and wrongfully withdrew funds from the company. In the first cause of action, Calabrese sought an order removing AJG Parkview as a member of Parkview at Salisbury for cause. In the second cause of action, Calabrese sought to set aside the operating agreement as an adhesion contract. In the third cause of action, Calabrese sought to set aside the operating agreement as unconscionable. In the fourth cause of action, Calabrese sought damages for breach of fiduciary duty. In the fifth cause of action, Calabrese sought damages for breach of the operating agreement. Calabrese’s second and third causes of action were dismissed by order dated August 24, 2015. Calabrese’s first, fourth, and fifth causes of action were dismissed by order dated August 22, 2016.

In its answer, defendant AJG Parkview asserted four counterclaims. The first counterclaim is for breach of the July 2013 operating agreement by failing to make distributions to AJG Parkview. The second counterclaim is for a declaratory judgment as to AJG Parkview’s rights under the July 2013 and May 21, 2014 agreements. The third counterclaim is for breach of fiduciary duty by disloyalty, self-dealing, and looting. In the fourth counterclaim, AJG Parkview incorporates its claims in Index No. 603044/15, as well as its claims in Index No. 605226/15, a proceeding for the judicial dissolution of Parkview at Salisbury, LLC (see below).

On May 25, 2015, AJG Parkview commenced Index No. 603044/15 against Parkview at Salisbury, Calabrese Bros. Development Corp., and James Calabrese. In the first cause of action, AJG Parkview seeks a declaratory judgment that the reserve requirement of Sec. 7.1[c] of the operating agreement applies to all costs of construction. In the second cause of action, AJG seeks a declaratory judgment terminating the construction management contract for willful misconduct. In the third cause of action, AJG seeks an accounting with respect to the affairs of Parkview at Salisbury. In the fourth cause of action, AJG seeks a declaratory judgment that it is the prevailing party entitled to attorney fees. In the fifth cause of action, AJG seeks damages for breach of fiduciary duty. In the sixth cause of action, AJG seeks damages for breach of the implied covenant of good faith and fair dealing. The seventh cause of action is for breach of the operating agreement. The eighth cause of action is for breach of the May 2014 agreement. In the ninth cause of action, AJG seeks to impose a constructive trust upon Calabrese’s interest in Parkview at Salisbury.

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By order dated June 30, 2015, the court issued a preliminary injunction, restraining Parkview at Salisbury and Calabrese from proceeding with any closings of condominium units, unless the sales contract had been provided to AJG Parkview within 24 hours of execution and AJG Parkview was provided with 24 hour notice of the closing. Additionally, the court restrained Parkview at Salisbury and Calabrese from making any distributions or payment of funds from the closing attorney's escrow account without the signature of both members of Parkview at Salisbury, except for payments in the ordinary course of business.

On August 13, 2015, AJG Parkview commenced a proceeding for the judicial dissolution of Parkview at Salisbury, LLC. On August 24, 2015, Gerard Fishberg, Esq. was appointed as receiver of Parkview at Salisbury, LLC.

By order dated August 22, 2016, defendant AJG Parkview's motion for summary judgment on its first counterclaim for breach of the operating agreement by failing to make the "first preferred return" was denied. In the August 22 order, defendant AJG Parkview's motion for summary judgment on its claim for breach of the operating agreement by failing to make the "second preferred return" was denied, with leave to renew following the receiver's final accounting. By order dated August 30, 2016, the court granted summary judgment to plaintiff AJG Parkview to the extent of declaring that it had made total capital contributions of \$2,652,000. By order dated September 1, 2016, defendant Calabrese's motion for an order directing the receiver to pay defendant Breeze Bros. Aluminum & Vinyl Siding Co., Inc. for work performed on the project was granted to the extent of \$162,401.04. The court determined that Breeze Bros.' request for a construction management fee in the amount of \$168,593.75 should await a determination of the profit on the project.

By orders to show cause dated October 19, 2016, Calabrese moves for leave to reargue the parties' motions for summary judgment with respect to the August 22, 2016 and August 30, 2016 orders. Calabrese argues that his claim against AJG Parkview for breach of the operating agreement should not have been dismissed because Sec 7.2 of the operating agreement provides that loans owed to creditors must be paid before any capital may be returned to members, or the first or second preferred returns paid to AJG. Calabrese further argues that the provision in the operating agreement for the "first preferred return" is unconscionable.

In opposition, AJG Parkview argues that the operating agreement should be enforced according to its terms and is not unconscionable. At bottom, the parties' dispute centers upon the interpretation of the terms "first preferred return" and "second preferred return" as used in the operating agreement.

Limited Liability Company Law § 503 provides that the profits and losses of a limited liability company shall be allocated among the members in the manner provided in the operating agreement. If the operating agreement does not so provide, profits and losses shall be allocated on the basis of the value of the contributions of each member (Id). Allocation of profits need not be in proportion to the monetary contributions of the members (McKinney's Practice Commentary 7.2).

As a general rule, courts must enforce shareholder agreements according to their terms. Such agreements avoid costly, lengthy litigation and promote reliance, predictability, and definitiveness in relationships among shareholders in close corporations (**Matter of Penepent Corp.**, 96 NY2d 186, 192 [2001]). Similar considerations apply when interpreting operating agreements which govern limited liability companies. When interpreting the Limited Liability Company Law, or the terms of an operating agreement, analogies may be made to both corporations and partnerships (McKinney's Practice Commentary 1.3).

Partnership Law § 40(4) provides that a partner shall receive interest on the capital contributed by him only from the date when repayment should be made. See also **Sutton v Burdick**, 135 AD3d 1016, 1019 [3d Dept. 2016]). Thus, before payment is due, a partner's capital contribution does not bear interest.

In defining "first preferred return," the operating agreement does not speak of a return on capital, but rather a return of capital to the capital member. Similarly, the definition of "second preferred return" speaks of a return to the capital member. While the second preferred return is to be calculated at 12% per year, and compounded monthly, it does not expressly refer to interest being paid on the member's capital contribution. The court concludes that the first and second preferred returns were intended to provide for a return of capital to the capital member, rather than interest, or a return on capital.

Accordingly, plaintiff Calabrese's motion for leave to reargue the parties' summary judgment motions is **granted**. Upon reargument, plaintiff's Calabrese's motions for summary judgment are **granted** to the extent of declaring that following the

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sale of the last condominium unit and the receiver's final accounting, defendant AJG Parkview shall be entitled to the return of its capital contribution of \$2,652,000. Any remaining profit shall be distributed to the members of Parkview At Salisbury LLC on a 50-50 basis.

So ordered.

Date: DEC 07 2016


J.S.C.

ENTERED

DEC 12 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE